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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OKLAHOMA,

Petitioner,

v.

ARTHUR J. TODD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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September, 1987

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QUESTIONS PRESENTED

1. Whether a conviction for child abuse pursuant to 21 O.S. Supp. 1986, § 843, bars a subsequent prosecution for First Degree Murder pursuant to 21 O.S.Supp. 1986, § 701.7(c), where the victim of the abuse did not die until subsequent to the prosecution for child abuse.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities.	ii
Opinion Below	1
Jurisdiction.	2
Relevant Constitutional and Statutory Provision	2
Statement of the Case	4
Statement of the Facts.	5
Reasons for Granting the Writ	6
I.	
THE OKLAHOMA COURT OF CRIMINAL APPEALS INTERPRETATION OF THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION IS IN CONFLICT WITH OPINIONS ISSUED BY THE UNITED STATES SUPREME COURT AND SEVERAL UNITED STATES COURTS OF APPEALS	6

Table of Authorities

Ashe v. Swenson, 397 U.S. 436, 453, n. 7 (1970).	8
Brown v. Ohio, 432 U.S. 161, 169, n. 7 (1977)	6,7

	Page
Culberson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972).	9
Diaz v. United States, 223 U.S. 442, 448-449 (1912)	6,7, 8
Garrett v. United States, 471 U.S. 773, 791 (1985)	8
Mitchell v. Cody, 783 F.2d 669 (6th Cir. 1986)	8
United States v. Stearns, 707 F.2d 391, 393 (9th Cir. 1983).	9
Conclusion.	9

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PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, State of Oklahoma, by and through the Attorney General of the State of Oklahoma, Robert H. Henry, prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The decision of the Oklahoma Court of Criminal Appeals for which this petition is sought has not been designated for publication. The style and the court below was Arthur John Todd v. The Honorable Myrna Lansdown, Special

District Judge for Washington County, Oklahoma Court of Criminal Appeals, No. P-87-452. The opinion for which review is sought was rendered on July 31, 1987. The State of Oklahoma filed a Petition for Rehearing and the Oklahoma Court of Criminal Appeals dismissed the Petition for Rehearing on August 26, 1987. The text of the Order of the Oklahoma Court of Criminal Appeals for which review is sought is attached hereto as Appendix A, and the Order of the Oklahoma Court of Criminal Appeals dismissing the Petition for Rehearing is attached hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 O.S. Supp. 1986, § 843 provides:

§ 843. Abuse of children-Penalty.

Any parent or other person who shall willfully or maliciously injure, torture, maim, or use unreasonable force upon a child under the age of eighteen (18), or who shall cause, procure or permit any of said acts to be done, shall be punished by imprisonment in the State Penitentiary not exceeding twenty (20) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment.

21 O.S. Supp. 1986, § 701.7 provides:

§ 701.7. Murder in the first degree.

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person who commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

C. A person commits murder in the first degree when the death of a child results from injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

STATEMENT OF THE CASE

The State of Oklahoma seeks a review of the Order of the Oklahoma Court of Criminal Appeals granting a writ of prohibition prohibiting the State of Oklahoma in prosecuting Arthur John Todd for the crime of First Degree Murder. The

Order of the Court is attached hereto as Appendix A.

STATEMENT OF THE FACTS

On January 8, 1986, Arthur John Todd beat his three-month-old daughter. (App. A at 3a). Arthur John Todd was convicted of child abuse pursuant to 21 O.S.Supp. 1986, § 843, after former conviction of a felony, for the January 8, 1986 beating, in the District Court of Washington County, Oklahoma on April 16, 1986 (App. A at 3a). Arthur John Todd's three-month-old daughter died as a result of the January 8, 1986, beating on November 7, 1986. (App. A at 3 a). Arthur John Todd was charged with First Degree Murder in the District Court of Washington County, Oklahoma, on March 30, 1987, for the January 8, 1986, beating of his three-month-old daughter, pursuant to 21 O.S. Supp. 1986 § 701.7(c). Arthur John Todd then sought, and was granted a writ of prohibition from the Oklahoma Court of

Criminal Appeals prohibiting the State of Oklahoma from prosecuting Arthur John Todd for First Degree Murder.

REASONS FOR GRANTING THE WRIT

PROPOSITION I

THE OKLAHOMA COURT OF CRIMINAL APPEALS INTERPRETATION OF THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION IS IN CONFLICT WITH OPINIONS ISSUED BY THE UNITED STATES SUPREME COURT AND SEVERAL UNITED STATES COURTS OF APPEALS.

The Respondent, Arthur John Todd, beat a three-month-old infant resulting in her death ten months later. The Respondent was convicted of child abuse before the infant died. The Oklahoma Court of Criminal Appeals prohibited the State of Oklahoma from prosecuting the Respondent for murder after the infant died. The Oklahoma Court of Criminal Appeals maintained that the exception to successive prosecutions found in Diaz v. United States, 223 U.S. 442, 448-449 (1912), was not applicable in the present case.

In Diaz v. United States, cited above, the accused was tried for assault and battery and then subsequent to the death of the victim of the assault, the accused was prosecuted for homicide. The Court stated the following:

> The death of the injured person was the principle element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense.

Id. 223 U.S. at 449. This Court has recognized the authority of Diaz v. United States, cited above.

> An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.

Brown v. Ohio, 432 U.S. 161, 169 n. 7 (1977) (citing Diaz v. United States, 223

U.S. 442, 448-449 (1912), and Ashe v. Swenson, 397 U.S. 436, 453, n. 7 (1970) (Brennan, J., concurring)). This Court has recently recognized the continued authority of Diaz v. United States, cited above. Garrett v. United States, 471 U.S. 773, 791 (1985).

The United States Court of Appeals for the Sixth Circuit recognized the continued authority of Diaz v. United States, cited above. Mitchell v. Cody, 783 F.2d 669 (6th Cir. 1986). In Mitchell v. Cody, cited above, the Sixth Circuit held that an accused's plea of guilty to driving while intoxicated and other charges did not bar his subsequent prosecution for vehicular homicide when the victim died.

The United States Court of Appeals for the Ninth Circuit has held that a conviction for theft did not bar a subsequent prosecution for felony-murder where the prosecution was unable to

ascertain the facts necessary to sustain the greater charge prior to the theft conviction. United States v. Stearns, 707 F.2d 391, 393 (9th Cir. 1983).

The United States Court of Appeals for the Fifth Circuit has held that a conviction of manslaughter was not barred by a prior conviction of assault where the victim did not die until after the assault conviction. Culberson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972).

In the present case, the Oklahoma Court of Criminal Appeals indicated that the January 9, 1986 beating could not be utilized to support a conviction for child abuse and then a subsequent charge for murder pursuant to the Fifth Amendment, notwithstanding the intervening death of the infant.

CONCLUSION

The interpretation of the Fifth Amendment by the Oklahoma Court of Criminal Appeals requires prosecutors to

delay to file charges against criminal defendants until medical science has exhausted its efforts in assisting the victims of violent crimes. Criminal defendants have a legitimate interest in having charges brought in a timely fashion, and a constitutionally mandated speedy trial. Should a prosecutor be forced to abandon a timely charge of child abuse, weighing the chances of a possible death of the victim at some indefinite time in the future, and possibly forego any charge against the perpetrator of a violent crime? The Fifth Amendment does not require such a result and the Petitioner, State of Oklahoma, respectfuly asks this Court to grant the writ of certiorari and reverse the judgment of the court below.

Respectfully submitted,

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